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IN THE

Supreme Court of the United States

October Term, 1957

No. 856

EDWARD POOL and LOTTIE POOL, EDWARD POOL, LOTTIE POOL, WILLIAM K. MURPHY, EDNA MURPHY, WILLIAM K. MURPHY and EDNA MURPHY,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING.

IRVING I. ANGERAD,
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Los Angeles 48, California,
Attorney for Petitioners.

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To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Come now the Petitioners in the above entitled case, by their attorney, Irving I. Axelrad, and respectfully petition this Court for reconsideration of the Order entered April 28, 1958, denying the Petition for a Writ of Certiorari in this case.

1. As grounds for this Petition for Rehearing, Petitioners invite attention to the decision of the Sixth Circuit in *Yunker v. Commissioner*, decided on May 1, 1958 (not yet officially reported, but reproduced at paragraph

9487, C. C. H. Standard Federal Tax Reports), where the Tax Court was again reversed for having interpreted the statute in the same way as it did in the present case.

The *Yunker* case, decided subsequent to the denial of certiorari in this case, is opposed, in principle, with the decision of the Court of Appeals below. The *Yunker* decision demonstrates that, contrary to the decision of the Court below and the position of the Solicitor General, the Sixth Circuit, like the Third, Seventh and Eighth Circuits, agrees that, where there is no dispute concerning the underlying facts, the question posed in a case like this is one where "the reviewing court is not bound by the findings of ultimate fact below" and that what is involved is "the interpretation of the statute" where the phrases " 'trade or business,' 'ordinary' and 'customers' are to be construed in their ordinary and not in an artificially created meaning."

The *Yunker* decision also demonstrates that the Sixth Circuit, contrary to the decision of the Court below and the position of the Solicitor General, agrees with the Third, Seventh and Eighth Circuits that where property is not originally acquired for resale (acquired by inheritance in *Yunker*), the facts that it is disposed of by piecemeal sales, that there are sales promotions and advertising, and that the sales are frequent and continuous, do not justify the Tax Court's ultimate conclusion that the sales are made in the course of a business.

In fine, the Sixth Circuit, contrary to the decision of the Court below and the position of the Solicitor General, agrees with the Third, Seventh and Eighth Circuits that, where property is originally acquired for purposes other than resale, an ultimate disposition by numerous sales is

not to be taxed differently than would have been the case if all the property had been sold at one time; the opinion states:

> "If petitioner had sold the entire tract at a profit, in one transaction, it is unquestioned that she would be entitled to capital gains treatment. It was impossible for her to sell the entire tract at one time at a profit. To hold that she would not be entitled to capital gains treatment, when she would otherwise be entitled to it, merely because she selected the only possible method of selling her property at a profit, by installing improvements and selling in smaller parcels, would seem to be an injustice resulting from a forced and artificial construction of the statute, which, in our view, could not have been intended by Congress."

It should be emphasized that in *Yunker* the sales were taxed as capital gains even though the property was improved in order to make it more salable while in the present case, the property was sold "as is."

And, in contrast to the position of the Solicitor General to the effect that there is no dissension among the courts, the Sixth Circuit recognized in the *Yunker* opinion that "some courts differ in their conclusions in resolving the problem posed in this case . . . ." Thus, the Sixth Circuit, like the Eighth and Ninth Circuits, has taken cognizance of the existing divergent judicial views concerning the meaning of the statute. See our Reply Brief, pages 10-13.

2. As a further ground for this Petition for Rehearing, Petitioners show that on April 24, 1958, a Reply was filed to the Commissioner's Brief in Opposition in this,

case, pointing out serious errors in the Commissioner's contentions that there are no conflicting decisions. These errors consist of serious misstatement of the facts of the subject case, of the holdings of the cases which we asserted to be in conflict with the decision below, and distorted reproduction of language from opinions of other Courts of Appeals. Even after the fullest allowance for the zeal of advocacy, we believe the Commissioner's brief in opposition so far oversteps an acceptable norm that it may well have misled this Court. This is particularly so because of the reliance which this Court must inevitably place on the Solicitor General's views in the selective process of certiorari.

Petitioners' reply brief, filed as promptly as airmail service between Washington and Los Angeles and printing and writing would permit, was filed with the Court on April 24, 1958, just one week after the brief in opposition was filed. This may have been too late for effective consideration by the Court in acting on the petition.

The additional grounds, therefore, upon which Petitioners seek a rehearing and on which they urge that certiorari be granted are those fully stated in the reply brief because those grounds may not have been available to the Court prior to acting on the petition. Accordingly, to avoid repetition, we respectfully refer this Court to the reply brief for a full statement of those grounds and a clear demonstration that there is a direct and serious conflict on the meaning of the statute which was erroneously applied by the Court below.

Conclusion.

This Petition for Rehearing should be granted, the Order denying certiorari should be withdrawn, and the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

IRVING I. AXELRAD,
Attorney for Petitioners.

MITCHELL, SILBERBERG & KNUPP,
Of Counsel.

May 20, 1958.

Certificate of Counsel.

Irving I. Axelrad, counsel for the Petitioners in this case, does hereby certify that the annexed Petition for Rehearing is presented in good faith, and not for delay, and that substantial grounds exist for a rehearing which were not presented to and, in part, may not have been available to the Court prior to its having reached its decision to deny the Petition for a Writ of Certiorari.

IRVING I. AXELRAD.